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DISCOVERY UNDER THE JUDICATURE ACTS, 1873, 1875.

PART I.

DISCOVERY is in law the compulsory disclosure by a litigant of such facts within his knowledge, and of the contents of such documents in his possession, as will aid his adversary in proving his case or defence. The disclosure is made by a statement in writing, signed and sworn to, of the facts required to be disclosed, and by an actual production of the documents. The statement in writing must also specify what documents, if any, the litigant has in his possession, the contents of which will aid his adversary in proving his case or defence; for it is only of documents so specified that production can be compelled. The reason for requiring the statement in writing to be sworn to is peculiar. The reason, or at least the principal reason, for requiring the statements of a witness to be made under oath is the security which an oath is supposed to furnish that the witness will not state *more* than is true, *i. e.*, what is untrue; but in the case of discovery the *sole* reason is the security which an oath is supposed to furnish that the litigart giving the discovery will not state *less* than is true, *i. e.*, deny what is true. In the case of a witness, the danger chiefly to be guarded against is, that he will endeavor to serve the party by whom he is called, and to injure the adverse party, by stating more than the truth warrants; and, as there is no good reason why the security of an oath should not be given, the law

makes the oath of a witness indispensable to the admissibility of his testimony. In the case of a litigant giving discovery, however, it is not possible for him to serve himself (except indirectly), for his statements are under no circumstances evidence in his own favor; and therefore the law has no occasion to guard against his stating in his own favor more than is true. Still less occasion has the law to guard against his stating more than the truth in favor of his adversary, his own interest being an abundant protection against that. There is, therefore, no reason why the admissibility in evidence of a statement by way of discovery should be at all dependent upon its being under oath, for in no event is it admissible as evidence except as against the party making it, and it is admissible as against him, not because it is under oath, but because it is an admission against his own interest. There is, however, great danger that a party giving discovery will deny, or at least evade admitting, what is true in favor of his adversary; and it is to guard against this danger that he is required to give his discovery under oath, so that he may be compelled to accept the alternative of admitting, what is true, or that of incurring the pains and penalties of perjury. Statements, therefore, by way of discovery are required to be made under oath, not because an oath affects their admissibility as evidence, or even their credibility, but because, being against the interest of the party making them, they are supposed to be made only by compulsion, and an oath furnishes the only effective means of compulsion known to the law; for it would be idle to compel a litigant to say whether such and such things are not true, if he could with impunity deny them to be true, though he knew to the contrary. Upon the whole, therefore, while an oath is required, in the case of a witness, chiefly in the interest of the party against whom he is called, it is required of a party giving discovery solely in the interest of the party seeking the discovery.

It is scarcely necessary to say that discovery is not an original product of English soil, and that the common law has ever been a total stranger to it. Its name, indeed, is English, but the thing itself is entirely foreign. It was borrowed by the Court of Chancery, directly from the English ecclesiastical courts, — indirectly from the civil and canon law. Until about the middle of the present century, when full power to compel discovery was conferred by statute upon the common-law courts, the Court of Chancery enforced discovery for the benefit, as well of suitors in the common-law courts, as of its own suitors. From the date last mentioned, however, to

the time when the Judicature Acts came into operation, each of the three common-law courts, as well as each of the several branches of the Court of Chancery, enforced discovery for the benefit of its own suitors. Prior to the Judicature Acts, therefore, discovery was administered in England under three different systems of procedure, namely, that of the ecclesiastical courts, that of the Court of Chancery, and that of the common law. Perhaps it would be better to say it was administered under three different systems of pleading, as pleading is the only important branch of procedure with which discovery has much connection. With pleading, however, discovery has so intimate a connection that it is impossible to deal with it intelligently without an intelligent understanding of the system of pleading under which it is administered. It is proper, therefore, to point out the more important features of each of the three systems of pleading just referred to, so that it may be seen, not only what is the nature of each, but wherein each of them differs in any important particulars from either or both of the others, — particularly, wherein that of the ecclesiastical courts differs from that of the common law; for that of the Court of Chancery scarcely has an important feature which was not borrowed from one of the other two. In respect to the system of the ecclesiastical courts, however, it should be observed that, while it is in substance that of the civil and canon law, pure and simple, yet it has one or two peculiarities of form which tend to conceal its true nature; and it will, therefore, be convenient to compare the other two systems with that of the civil and canon law generally, leaving the slight modifications which the latter system has undergone in the English ecclesiastical courts to be afterwards pointed out.

The most radical difference between the common-law system of pleading and that of the civil and canon law will be found in the fact that, in the latter system, all the pleadings are affirmative. This will strike a common-law lawyer as anomalous, but in truth it is the converse fact, that common-law pleadings are negative as well as affirmative, that is anomalous. This is shown by the fact that the existence of negative pleadings in the common-law system is due entirely to the existence in that system of a positive and arbitrary rule, namely, that every allegation in any pleading upon which a traverse can be properly taken[1] shall be considered as

[1] See *infra*, p. 149, n. 1.

admitted by the adverse party to be true, unless he traverse it. But for this rule, every fact alleged in an affirmative pleading must, in order to be available, have been proved, whether it was traversed by the adverse party or not; and hence neither party would have had any occasion to plead negatively.

To say, therefore, that there were no negative pleadings in the civil and canon law is only to say that there was nothing in that law to render negative pleadings necessary. When, therefore, a plaintiff had stated his case in a pleading, the question for the defendant to consider was whether he had an affirmative defence. If he had, he would plead it; if he had not, he would not plead at all, and the plaintiff would recover on proving the facts alleged in his pleading, provided such pleading was good in law. If the defendant pleaded an affirmative defence, the plaintiff must then consider whether he had facts which would support an affirmative replication. If he had, he would plead such facts; if he had not, the pleadings would end with the defendant's affirmative defence. In this way, the pleadings continued until the facts were exhausted, *i. e.*, until it appeared that the party whose turn it was to plead had nothing further to allege.

In respect to the facts necessary to support them, pleadings in the civil and canon law did not differ materially from affirmative pleadings at common law, but in respect to the mode of stating those facts they differed widely; and this was because of another positive rule of the common law, namely, that facts must be stated, not as they actually existed, but according to their legal effect and operation. Even this rule, however, existed for the sake of the more general rule already stated; for, as each party was required either to traverse or to admit to be true the statements made in his adversary's pleadings, so he was entitled in turn to have those statements so made that a traverse could be taken upon them which would form a good issue.

In the mode of conducting the pleadings, the civil and canon law differed widely from the common law. At common law, the pleadings were conducted out of court by the respective attorneys, pursuant to established rules, the court not even knowing that an action was pending, unless its authority was invoked by one of the parties, either in his own favor or against the adverse party. In the civil and canon law, on the other hand, the conduct of the pleadings was under the constant superintendence and control of the court. Every pleading had to be brought into the registry of the

court, and filed by the registrar, and, until so filed, it had in law no existence; and yet it could not be filed without either the consent of the adverse party or the order of the court; and of course the court would not order a pleading to be filed without first hearing any objections raised to it by the adverse party. If objections were raised, they were either overruled or allowed. If overruled, the pleading was received; if allowed, the pleading was either rejected, and so went for nothing, or it was so amended as to remove the objections.[1] This proceeding, therefore, bore some

[1] The difference between the two systems stated in the text did not, however, always exist; for originally the conduct of the pleadings at common law appears to have been subject to the superintendence and control of the court, even to a greater degree than in the civil and canon law. Another difference, however, did always exist, namely, that, while in the civil and canon law the pleadings were always in writing, at common law they were always oral, in legal contemplation, until they were embodied in a parchment record. This is sufficiently proved by the records themselves, which are always in the present tense, and purport upon their face to be a strictly contemporaneous account of what was said and done in open court. That pleadings were originally oral is admitted on all hands; but it is commonly said that they ceased to be so about the middle of the reign of Edward III. It has also been commonly supposed that, so long as pleadings were oral, the act of recording them was in fact (as it always was in theory) strictly contemporaneous with the oral statement of them, *i. e.*, that a pleading was transferred by an officer of the court directly from the mouth of the pleader to the parchment roll. A very little reflection, however, will show that the act of stating a pleading orally, and the act of recording it, could never have been contemporaneous. It would not, indeed, be rational to suppose that the practice ever existed of stating pleadings orally (still less that of taking them down) in the very terms in which they were afterwards recorded. On the contrary, the rational supposition is that the oral statement was designed merely to inform the court and its officers and the adverse party what the pleading would be when formally drawn up and recorded, and that the officer of the court whose duty it was to make up the record merely took down such a minute of what was said as would enable him to perform that duty. Moreover, while both the oral statement and the minute of it were in French, the record was in Latin.

How then did this ancient practice differ from that which existed, for example, during the first quarter of the present century? Simply in this, namely, that, in the latter period, the oral statement of the pleadings in open court, and the minuting of them by an officer of the court, had ceased, and the pleadings were instead drawn up on paper by the attorneys of the respective parties (or by their procurement) in the precise form in which they were afterwards to be recorded, and a copy delivered to the attorney of the adverse party; and when the pleadings were finished the record was made up by the plaintiff's attorney, and carried into the proper office, where it was filed. The paper pleadings were, therefore, like the ancient official minute, mere memoranda from which the parchment record was to be made up, and when the latter was made up and filed the former were entirely superseded, and it was as if they had never existed. This explains the fact that the several paper pleadings were on their face incomplete documents, and were not signed by the attorney by whom, or by whose procurement, they were respectively drawn, being in fact mere segments of the future record.

It will be seen, therefore, that the change from the ancient to the modern practice was a change in the mode of conducting the pleadings, — not a change in the pleadings

resemblance to a demurrer at common law, though such resemblance was in truth less than at first sight it appears to have been. Upon the proceeding in question, there were no facts before the court; the facts stated in the pleading were simply assumed to exist; and, though a court can decide negatively that a certain legal conclusion does not follow from an assumed state of facts, it cannot decide affirmatively that such conclusion does follow; for the latter purpose, the facts must first be established. Therefore, while a decision against a pleading caused its final rejection, a decision in its favor was merely to the effect that it should be received as a pleading in the cause, and that the adverse party must therefore answer it at his peril.

As by the civil and canon law every successive pleading had to be proved, without any reference to the pleadings which followed it, and as all proof (other than documentary proof) had to be taken in writing and before the hearing of the cause, it followed that proof of each successive pleading might be taken before any further pleading was filed, or the taking of proofs might be postponed until the pleadings were concluded, and the proofs might then be taken as to all the pleadings together. So far as the proofs consisted of the testimony of witnesses, it is impossible to say, *a priori*, which of these plans would be found most convenient in any given case. So far, however, as they consisted of discovery, there is no doubt whatever which is the better plan; for discovery ought always to be had at the earliest practicable moment, and in particular it ought always to be had before witnesses are examined. It ought to be had at the earliest practicable moment, first, because the parties may die, and then their knowledge will die with them; secondly, because frequently a party cannot know, until discovery is had, how the subsequent prosecution or defence of the suit should be conducted, or even whether the further prosecution or defence of the suit should be persisted in. It should be had before witnesses are examined, first, because proof by means of discovery is less expensive by far than that by the testimony of witnesses; secondly, because proof by discovery is, so far as it goes, conclusive against the

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themselves, nor from oral to written pleadings. A change of the latter kind would have involved an abandonment, or an entire reconstruction, of the ancient common-law record, and, to a considerable extent, a reconstruction of the system of pleading itself. In particular, each pleading must have been made a complete document in itself, and, instead of a copy of it being delivered to the attorney of the adverse party, it must (like pleadings in Chancery) have been engrossed upon parchment and filed.

adverse party, whereas the testimony of witnesses is liable to be contradicted or not to be believed; thirdly, because discovery is the only compulsory means afforded by the civil and canon law of eliminating from a cause those facts about which there is no real dispute. The parties must of course respectively allege and prove every fact necessary to make out their respective case or defence; and yet nine-tenths of those facts the parties respectively may know to be true, while it may be difficult, or even impossible, to prove them all by witnesses. All such facts, therefore, should be proved by means of discovery, and thus eliminated from the controversy. Then the testimony of witnesses will be limited to its proper office, namely, the proof of matters actually in controversy. Accordingly, the course was to require the answer upon oath of the adverse party, as to the facts alleged in any pleading, to be made as soon as the latter was filed.

The next question is how the answers of parties upon oath were obtained. As the answers were in writing, one might naturally infer that they would be obtained by means of written interrogatories, prepared by the counsel of the adverse party, and either delivered to the party who was to answer them, or filed in the registry. In fact, however, a party was never permitted to interrogate the adverse party, either in writing or orally. How, then, were the answers of the latter obtained? It is conceivable that he should be required to answer the pleading itself, *i. e.*, to say whether the statements contained in it were or were not true; and this is what actually takes place in the English ecclesiastical courts; but in the civil and canon law such a course would have been open to this objection, namely, that, as by that law a pleading contained only the facts sought to be established, and not the evidence by which they were to be established, the adverse party would frequently deny the existence of the facts alleged, though he could not deny the existence of the evidence upon the strength of which the facts were alleged to exist; and therefore, if a party had been required, by way of discovery, only to answer the pleadings of the adverse party, the latter would not have obtained that benefit from the discovery to which he was entitled. To obviate this difficulty, each party, on filing a pleading, also prepared and filed another document containing so much of the evidence in support of the facts alleged in the pleading as he supposed to be within the knowledge of the adverse party, and this document the latter was required to answer. It was divided into numbered paragraphs, and each paragraph was

called a "position" (*positio*), while the document as a whole was called "positions." Each position had to be answered categorically and in its precise terms, just as an interrogatory addressed to a witness on cross-examination has to be answered.

It is proper also to state that still another document was prepared and filed, containing so much of the evidence in support of the facts alleged in the pleading as was expected to be established by the testimony of witnesses; and upon this document the party examined his witnesses. It was, like the preceding, divided into numbered paragraphs; but each paragraph was called an "article" (*articulus*), while the document as a whole was called "articles."

It must not be supposed, however, that positions and articles were always supplemental to a pleading; for positions had to be filed as often as discovery was wanted, and articles had to be filed as often as witnesses were to be examined. Wherever, therefore, a party sought discovery from the adverse party, or desired to examine witnesses, for the purpose of disproving facts alleged in a pleading by his adversary, it was necessary for him to file positions or articles, as the case might be; and yet there could be no affirmative pleading in such a case, as there were no *facts* to be alleged. In short, while there were no negative pleadings in the civil and canon law, either party might of course have a negative case to support in point of proof. Indeed, so often as a fact alleged by one party in pleading is controverted by the other, each of them has a case to support in point of proof, that of the former being affirmative, and that of the latter negative.

Interrogatories were used for one purpose only, namely, that of the cross-examination by each party of the witnesses of the adverse party. These, as well as the depositions of the witnesses, both on the direct and on the cross-examination, were kept secret until publication took place, and that was not till the examination and cross-examination of witnesses were concluded.

It has been already observed that, in the English ecclesiastical courts, answers by way of discovery are to the pleadings themselves; and the reason of that is, that in those courts there is no distinction between pleadings on the one hand, and positions and articles on the other, the three being consolidated and comprised in one document, — which is drawn in numbered paragraphs, and resembles positions and articles much more than it does a pleading proper; and this is the peculiarity in the pleadings of those

courts which is adverted to on a previous page.[1] A consequence of this is, that in those courts where a party has an affirmative case of his own to state, and also controverts the case stated in the previous pleading of his adversary (*i. e.*, has both an affirmative and a negative case in respect to proof), the pleading filed by him will comprise, not only his affirmative case and the evidence in support of it, but also the evidence in support of his negative case. Another consequence is, that in those courts, whenever a party either seeks discovery or wishes to examine witnesses, he must file a pleading, though he have no affirmative case to state; and, therefore, a pleading may consist of positions and articles alone, or of positions alone, or of articles alone. Moreover, a pleading never indicates at all by its form how many or what different elements it contains.

The administration of discovery in the ecclesiastical courts is instructive in several points of view. What chiefly strikes one is the fact that the administration of discovery in those courts has given rise to none of those troublesome and difficult questions which have so eminently characterized it in the Court of Chancery, in the common-law courts, and under the Judicature Acts.

I. The ecclesiastical courts never had occasion even to formulate the rule that no litigant is entitled to make use of the machinery of discovery for the purpose of prying into his adversary's case. There were two reasons for this, namely, first, that the use of positions, instead of interrogatories, made such a perversion of discovery impracticable; secondly, that a litigant was under little temptation to pry into his adversary's case, even if it had been practicable for him to do so; for, first, the use of positions made it necessary for a party seeking discovery to state affirmatively and in precise terms what he wished the adverse party to admit to be true, and the latter was required to swear only in the very terms of the position; and this would not at all serve the purposes of one who was seeking to pry into his adversary's case, for such an one is seeking to learn what he does not know, and is unable to imagine. Secondly, the ecclesiastical procedure did not regard a litigation as a game, either of skill or chance, but as a means of ascertaining truth and administering justice, and hence it furnished each litigant with the means of knowing beforehand precisely what evidence might be adduced against him, so that he should have plenty of time to prepare

[1] See *supra*, p. 139.

himself to meet it, and not be taken by surprise. Thus, the articles filed by each party disclosed fully, as has been seen, what he proposed to prove by the testimony of witnesses, and any testimony which was extra-articulate was liable to be suppressed; and each party was further required to produce each of his witnesses, before examining him, to the adverse party, and to inform the latter upon which of the articles each witness was to be examined. It is true, the depositions of witnesses were kept secret till publication passed, but then they were kept secret from both parties alike, and that was done solely from considerations of policy, namely, to prevent perjury and subornation of perjury. Then, as to documentary evidence, still greater security was provided that neither party should be taken by surprise; for each party was required, not only to describe fully, in a separate article, every document which he was to use as evidence, but also to annex to the articles the document itself, or a copy of it, if the original could not be had, or, if the original document was already in the registry of the court, then to refer to it as being there.

II. For the same reasons, no attempt was ever made in the ecclesiastical courts to use the machinery of discovery to supply defects in pleadings, *i. e.*, as a means of obtaining information which the pleadings of one party ought to furnish to the other, but did not.

III. For the first of the above reasons, namely, the necessity of using positions, no attempt was ever made in the ecclesiastical courts to obtain discovery before pleading, and to enable a party to draw his pleading.

IV. The necessity of extracting discovery by means of positions instead of interrogatories effectively prevented the vice of "fishing."

V. The practice which existed in the Court of Chancery of requiring an account by way of discovery was entirely unknown in the ecclesiastical courts. As the existence of such a practice in the Court of Chancery cannot be accounted for on any rational ground, it seems unnecessary to account for its non-existence in the ecclesiastical courts.

VI. The discovery and production of documents never made much figure in the ecclesiastical courts; and the reason of this must have been that such discovery and production were not often found necessary in those courts. One class of suits was, however, exceptional in this respect, namely, suits for the probate of

wills; and this was particularly true before the Wills Act,[1] when one or more documents of the most informal character might constitute a will of personal estate. Accordingly, in all such suits each party was required, at the proper time, to make, and file in the registry, an affidavit (called an affidavit of scripts), specifying all writings of a testamentary nature in his possession, or within his knowledge, and either to annex the same to his affidavit, or account for his not doing so; and if an affidavit was filed which was not sufficiently full, or sufficiently explicit, a further and better affidavit would be required. It will be seen, therefore, that the discovery of documents was an exception to the rule which required a party seeking discovery to state in a position what he claimed to be true, before he could call upon the adverse party to say upon his oath whether it was not true.

VII. There was no confusion in the ecclesiastical courts between discovery and relief; and therefore a party never sought in those courts to obtain a relief under the pretence of obtaining discovery, — a thing which often happened in the Court of Chancery.

VIII. In the ecclesiastical courts, a party could never refuse to answer by way of discovery, on the ground that the pleading, for the proof of which the discovery was sought, was bad in law, and hence proof of it would be useless; for in that case he should have procured the pleading to be rejected, and then no question as to the proof of it would have arisen.

IX. In the ecclesiastical courts a party could never refuse to answer by way of discovery, on the ground that he had a good affirmative answer to the pleading for the proof of which the discovery was sought, and hence that the discovery would be unnecessary and useless; for in those courts it was not till a pleading had been proved that the question could be raised whether the adverse party had an affirmative answer to it or not. Even at common law, the only reason why an affirmative pleading made it unnecessary to prove the pleading to which it was an answer was, that the former operated as a constructive admission of the truth of the latter; though even that was not strictly true, as it was not the affirmative pleading, but the absence of a negative pleading, that caused the constructive admission.

Lastly. The burden of answering positions imposed upon suitors in the ecclesiastical courts was no greater than that imposed

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[1] 7 Wm. IV. & 1 Vict., c. 26.

upon witnesses of answering articles; and therefore there was never any ground for saying of discovery as administered in those courts (what English judges have often said of discovery as administered in the Court of Chancery), that it was cruel and oppressive.

Turning now from the ecclesiastical courts, we proceed to consider briefly the nature of the common-law system of pleading. Certain features of that system have, indeed, already been adverted to; but that was merely for the purpose of bringing out more clearly the nature and working of the civil and canon law system. The common-law system was supposed to form, in the minds of most readers, the standard with which any other system would be compared; and therefore the more familiar system was used as a means of explaining that which was less familiar. As between the common-law system, however, and that of the civil and canon law, it is the latter that constitutes the true standard, as the former is an offshoot from the latter; and yet it would be a great mistake to suppose that the latter will furnish the key with which to unlock the secrets of the former; for, while the latter is a natural, and therefore a simple system, the former is highly artificial and technical. While, therefore, the civil and canon law system of pleading should be the starting point of any inquiry into the essential nature of the common-law system, the chief object of such an inquiry should be to ascertain why two systems, between which there existed the relation of parent and child, differed from each other so radically. What was the cause of so remarkable a phenomenon? The answer may be summed up in three words, namely, trial by jury.

In the civil and canon law, all the questions in a cause were decided by a judge, and hence there was no necessity for making any sharp distinction between questions of law and questions of fact. In the common law, on the other hand, all the controverted facts in a cause upon which the ultimate rights of the parties depended had to be ascertained by the verdict of a jury; and before that could be done it was necessary, first, to ascertain whether there were any facts in controversy, and if there were, secondly, to put the case in a fit state for the trial of such facts by a jury; and, whether a trial by jury was found to be necessary in a given cause or not, it was necessary, thirdly, to put the cause in a fit state to receive the judgment of the court, and, to do that, it was necessary that all the facts involved in a cause should be established, namely, either by the admissions of the parties or by the

verdict of a jury. Moreover, all these three objects were sought to be accomplished by means of the pleadings alone; and accordingly certain rules of pleading were established with a view to their accomplishment. The first of these rules was the one heretofore adverted to, namely, that all the material and issuable[1] facts alleged in any pleading shall be considered as admitted by the adverse party to be true, unless he expressly deny them. Suppose then, in a given case, each of the parties in turn pleads affirmatively, as he would do in the civil and canon law, until the facts are exhausted, and then the pleadings cease. The result will be that all the material and issuable facts alleged on either side will be admitted to be true, and it will only remain for the court to pronounce the judgment of the law upon those admitted facts. Again, suppose that, at some stage of the pleading, the party whose turn it is to plead, instead of pleading affirmatively, traverses some material and issuable fact alleged in the last pleading of his adversary. The result will then be that all the material and issuable facts alleged on either side will be admitted to be true except the one fact traversed, and that will have to be tried by a jury; but when it is so tried, the case will be ready for the judgment of the court. So far, therefore, every object is perfectly accomplished by the operation of the rule in question. Suppose, however, at some stage of the pleading, the party whose turn it is to plead insists upon traversing every material and issuable fact alleged in the last pleading of his adversary, and also upon pleading one or more affirmative pleas. It is clear that the rule in question would not prevent his doing so, and yet to permit him to do so would be to permit that rule to be nullified at the will of either party; for the sole object of the rule was to procure admissions by one party of facts alleged by the adverse party. Moreover, it could not be assumed that such admissions would ever be

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[1] An issuable or traversable fact is one upon the truth of which the right of action depends, and upon the traverse of which, therefore, a good issue will arise, *i. e.*, an issue which (the other necessary facts being admitted) will decide the action. A material fact which is not issuable (and therefore not traversable) is one the truth of which is not necessary to the maintenance of the action, but the truth of which will affect the amount which the plaintiff will be entitled to recover. As such a fact cannot be traversed, of course a failure to traverse it will not be a constructive admission of its truth. It is for this reason that the plaintiff, in an action which sounds in damages, always has to prove his damages, and have them assessed by a jury, whether the defendant has traversed the declaration, or pleaded to it affirmatively, or demurred to it, or has not pleaded to it at all.

voluntarily given, and therefore the rule must have contemplated some kind of compulsion.

We must therefore suppose that the rule in question did not stand alone, but that it was protected by some other rule or rules which prevented its operation from being defeated. Accordingly, we find that it was an established rule that pleadings should not be double. Thus, a plaintiff might have a cause of action which could be rested upon several grounds of fact, but yet he could state one ground only, even though he should lose his case in consequence. So a defendant might have a negative defence, and also an affirmative defence, or two or more negative defences, or two or more affirmative defences; but yet he could avail himself of only one of them, even though he should be defeated in consequence. And so it was as to all subsequent pleadings. Accordingly, in the case last supposed, the party must plead either affirmatively or negatively, and not both affirmatively and negatively, and he could plead only one plea of either kind. If it be asked whether trial by jury made so much rigor necessary, and in particular whether, as every affirmative pleading was required to be single, a traverse might not have been permitted to extend to the entire pleading to which it was pleaded, instead of being limited to a single fact,[1] it will be sufficient to answer that those by whom the common-law system of pleading was established and built up would have said, "No"; for it was with them a cardinal doctrine that trial by jury made it necessary that the controversy should be reduced to a single point (called an issue); and, indeed, the notion that every controversy must by pleading be reduced to a single point became so deeply rooted in the minds of common-law lawyers, that they supposed it must be the chief object of every system of pleading to bring about that result.

It must, however, be admitted that the rule requiring every traverse to be limited to one material and issuable fact was, apparently from the beginning, subject to certain exceptions. The most important of these had their origin in that form of traverse known as the general issue, and which, while it was always negative in its terms, and always operated directly as a traverse, yet frequently did not traverse any fact alleged in the declaration, but traversed instead some conclusion deducible, either from all the facts alleged in the declaration, or at least from two or more of those facts.

[1] But see Robinson *v.* Raley, 1 Burr. 316; Rowles *v.* Lusty, 4 Bing. 428.

Thus, the general issue in the action of trespass was "not guilty"; and accordingly, when that action was brought for a trespass to property, the plea of the general issue operated as a denial both that the plaintiff committed the acts complained of, and also that the property to which those acts were alleged to have been committed was the plaintiff's property. So, in the action of debt on simple contract, the general issue was *nil debet;* and under it, therefore, a defendant could not only put the plaintiff to the proof of everything alleged in the declaration, but could also himself prove any affirmative defence which showed that he was not indebted to the plaintiff, as alleged in the declaration, at the time when the action was brought. Had this action, therefore, continued to be the remedy for the recovery of all simple contract debts (instead of going out of use, as it did, at an early day, on account of the defendant's ability to wage his law), it would have exerted a momentous influence upon the fortunes of common-law pleading, as it would virtually have put an end to all pleadings subsequent to the declaration in a class of actions which greatly exceeded in number all other actions put together.

Another exception to the rule that a traverse must be limited to some one material and issuable fact was made by the form of traverse known as the replication *de injuria sua propria absque tali causa;* for this had the effect of traversing the entire plea to which it was pleaded, and so virtually of putting an end to all pleadings subsequent to the defendant's plea. It was, however, available in only a limited number of cases.

There were, moreover, two actions, both of comparatively late origin, and both of great practical importance, in which the pleadings not only ended virtually with the declaration in nearly every case, but in which the declaration itself was reduced to a minimum, namely, the action on the case and the action of ejectment.

The action on the case had its origin, as is well known, in the Statute of Westminster 2 (13 Edw. I., c. 24). No one could have anticipated that this action was destined to have so disastrous an effect upon the common-law system of pleading; for, in its origin, it differed from the action of trespass (in analogy to which it was framed) in having no prescribed form, and in being based upon the special facts and circumstances of each case, and it was hence called a special action on the case. Accordingly, the declaration in it was much longer, and much more special, than the declaration in trespass, and its general issue was the same, namely, not guilty.

Indeed, it is not with this action in its original form, but with the singular uses to which it was afterwards applied, that we now have chiefly to do; for it was at length employed (under the name of assumpsit) for the enforcement of all simple contracts which did not create debts, the excuse being that none of the older actions would lie upon such contracts; and thus an action of tort was converted into an action of contract. At a still later date, as the defendant could wage his law in an action of debt on simple contract, a necessity was felt for providing some other remedy for the recovery of simple contract debts; and accordingly the courts declared that, wherever there existed a simple contract debt, the law would imply a promise to pay it, and therefore an action of assumpsit would lie to recover it;[1] and thus assumpsit (i. e. *indebitatus assumpsit*) became the universal remedy for the recovery of simple contract debts. Moreover, it was this latest form of the action of assumpsit that exerted the extraordinary influence upon pleading which we are now considering. In fact, it exerted the same influence that would have been exerted by the action which it superseded, namely, debt on simple contract, if that action had maintained its ground; but it is important to observe that it exerted that influence by entirely different means, *i. e.*, not by the plea of the general issue, but by the declaration.

When the action of assumpsit was formed from the action on the case, the declaration still retained the semblance of a declaration in tort; for, while it set forth the contract which was the foundation of the action, yet it did so only by way of recital or inducement, and it treated the breach of the contract as a tort, and as the real foundation of the action; and it is not therefore very obvious why the old general issue of not guilty was not retained. Instead of that, however, a new general issue was framed (*non assumpsit*), which not only assumed the action to be founded on contract, but also conformed to the strictest rules governing traverses by traversing directly the making of the contract. When, however, *indebitatus assumpsit* came into use, the fictitious implied promise, though in truth a mere form, was declared upon as if it were an actual promise and hence it usurped the place in the declaration which belonged to the actual contract which created the debt; and, though the existence of the debt had to be stated, it was in fact stated only as the consideration for the fictitious promise, and there was only a

[1] See Slade's Case, 4 Rep. 92 b.

bare allusion to the contract which created the debt, merely by way of indicating the nature of the transaction[1] in which the debt had its origin. Such was the *indebitatus* count in *assumpsit;* and of course a consequence of it was that the general issue of *non assumpsit* (through no fault of its own) not only operated as a traverse of the entire declaration, but also let in every affirmative defence which showed that no debt existed when the action was brought; for if there was no debt, there was no promise.

Moreover, the general issue of *non assumpsit* having in this indirect way acquired so extensive an operation when pleaded to an *indebitatus* count, the same extent of operation was, by a strange perversity, at length given to it when pleaded to a special count, and even to the general issue of not guilty in the action on the case proper. These two abuses were, however, corrected by the Rules of Hilary Term, 1834, which reduced the operation of the general issue in both cases to its true limits, — unless, indeed, the limits fixed were somewhat too narrow. But unfortunately those rules dealt in the same way with *indebitatus assumpsit,* leaving the *indebitatus* count (which was the true source of the mischief) unchanged, and declaring in effect that the general issue of *non assumpsit* should operate only as a traverse of the declaration, and should not, therefore, let in any affirmative defence. They therefore presented an erroneous view, not only of the source of the mischief, but also of the true operation of the general issue of *non assumpsit,* when pleaded to an *indebitatus* count. Perhaps it was found easier to limit arbitrarily the operation of the general issue than to provide a substitute for the *indebitatus* counts.

The action of ejectment exerted the same kind of influence upon common-law pleading as the action on the case but in a very different way. First, it rendered practically obsolete all the ancient actions for the recovery of land; secondly, it was originally brought by an actual lessee for years against some third person who had ejected the plaintiff from his term; but, the lease having been made for the sole purpose of trying the lessor's power to make it, *i. e.*, his title to the land, it followed that the pleadings (which of course related merely to the lease) had no relation whatever to the question to be tried, namely, the lessor's title to the land. It is unnecessary, therefore, to pursue the subsequent history of the action; for, even in its original form, and before any fictions were

[1] *E.g.*, money paid, money lent, money had and received, goods bargained and sold, goods sold and delivered, work and labor.

introduced into it, it is plain that there were practically no pleadings whatever, and that all such actions had to be tried, therefore, without any aid from pleadings. Moreover, no change was made in this respect prior to the Judicature Acts.[1]

There is still another mode in which the rigor of the common-law system of pleading was from time to time relaxed, namely, by statute. First, by 4 & 5 Anne, c. 16, s. 4, it was declared that it should be lawful for any defendant, with leave of the court, to plead as many several matters as he should think necessary for his defence. Secondly, by the Common Law Procedure Act, 1852, s. 81, the privilege, which was limited by the statute of Anne to the defendant's plea, was extended to all subsequent pleadings on both sides. Under these statutes, everything depended upon the manner in which the court exercised the discretion with which it was intrusted; and, in respect to the subject now under consideration, the important question is, to what extent a defendant was permitted to traverse several matters in the declaration, or to traverse one or several matters, notwithstanding he also pleaded affirmatively. On these points, however, it is impossible to speak with certainty, as the temper (and therefore the practice) of the courts changed from time to time.[2] Thirdly, by the Common Law Pro-

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[1] See Common Law Procedure Act, 1852 (15 & 16 Vict., c. 76), s. 178.

[2] In the much litigated case of Gully *v.* Bishop of Exeter, 4 Bing. 525, 5 Bing. 42 (1826, 1827, and 1828), which was a *quare impedit*, and in which the plaintiff was obliged to trace his title through a period of two hundred years, the defendant (having obtained a rule to plead several matters) pleaded forty-three pleas, traversing every allegation in the declaration, though the plaintiff's claim rested solely on the validity of a deed of 1672, which the defendant sought to invalidate by setting up a subsequent deed of 1692. The plaintiff replied, the cause came on for trial, and the plaintiff was nonsuited; but the nonsuit was afterwards set aside, and a new trial granted. The plaintiff then made an application to the court to rescind the rule to plead several matters, which application was granted, on the ground that an improper use had been made of the rule. The defendant's counsel, in resisting the application, said (4 Bing. 536): "With the exception of four, all the pleas raised issues on allegations in the declaration, which the court could not refuse to the defendant the privilege of disputing; and the court had repeatedly refused to strike out pleas unless a clear case of vexation were made out."

The defendant then obtained a new rule *nisi* to plead sixteen specified pleas; the plaintiff's counsel showed cause against making the rule absolute, and the defendant's counsel, in supporting the rule, said (5 Bing. 43): "It has always been the practice of the court to permit the defendant to take issue on every matter of fact advanced by the plaintiff, and to hold him, like the prosecutor in criminal proceedings, to the strict proof of his title. . . . In the plaintiff's case there are two points: 1. the allegation of his title; 2. the disturbance by the defendants: but the disturbance being admitted, the defendants may apply themselves exclusively to the title, and if that title consists of an allega-

cedure Act, 1852, s. 84, any defendant was authorized, without the leave of court, to plead any two or more of the pleas therein enumerated, and two of the pleas thus enumerated were a plea denying a contract or debt alleged in the declaration, and the plea of not guilty. Fourthly, by the Common Law Procedure Act, 1852, ss. 77, 78, any plaintiff was authorized, without leave of court, to traverse the whole of any plea or subsequent pleading of the defendant, and any defendant was authorized to traverse the whole of any replication or subsequent pleading of the plaintiff.

It will be seen, therefore, that after the Common Law Procedure Act, 1852, very little remained of that once vital principle of common-law pleading, by which every controversy was reduced to a single issue, namely, the principle of compulsory admissions; for (1) the declaration was the only pleading the whole of which could not always be traversed by the adverse party as of right, and without the sacrifice of any other right; (2) in the great majority of cases (namely, in all cases in which an *indebitatus* count was used as well as in many other cases) the whole declaration could be traversed by pleading the general issue; (3) in all other cases, the whole declaration could be traversed with leave of the court; and (4) in ejectment, as has been seen, there were no pleadings, and therefore nothing to traverse.

Before leaving the subject of common-law pleading, it may be well to call attention to one or two points by which its kinship to the system of the civil and canon law appears.

I. It is a rule that every series of common-law pleadings must terminate either in a demurrer or in a traverse, while in the civil and canon law, as has been seen, the termination of pleadings is

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tion of many facts, may traverse them all." Burrough, J., said (p. 46): "I am happy at this opportunity of giving a death blow to a practice which has improperly prevailed for many years, and which I have long discountenanced. If in this case the deed of 1672 be set aside, all the other issues fall to the ground. As to the practice of the court, it cannot repeal the statute of Anne, and by that statute we are bound to exercise a discretion in the permission we grant to parties to plead several matters." Gaselee, J., said (p. 47): "The statute of Anne would never have been passed if such abuses had been anticipated as have taken place. The existing practice has given a defendant a most inconvenient advantage over a plaintiff. . . . The true principle of pleading several matters is, that if the justice of the case requires that a party should allege several defences, the court will not prevent it; but they will not allow a party to plead, merely for the purpose of throwing difficulties in the way of his opponent. . . . The defendant shall be put to elect which link of the plaintiff's title he will contest; and if he contests the deed of 1672, he may plead *non concessit*, and that the deed was fraudulent." Accordingly, the rule was discharged as to all the sixteen pleas except the two mentioned by Gaselee, J.

not marked by any affirmative act, but they simply cease when the party whose turn it is to plead fails to do so. This difference, however, may be easily explained. The first of the two common-law modes of terminating pleadings, namely, by demurrer, is in substance that of the civil and canon law, for a demurrer is only a form; it really amounts only to a statement on the record, by the party whose turn it is to plead, that he declines to do so, and demands the judgment of the court on the pleadings as they stand; and the use of this form is sufficiently accounted for by the fact that, at common law, in the absence of any traverse, all the facts stand admitted, and the case is therefore ready for the judgment of the court, whereas, in the civil and canon law, all the facts remain to be proved. On the other hand, the second mode of closing the pleadings at common law, namely, by a traverse, is entirely peculiar to that system, and exists only because of trial by jury, the sole purpose of a traverse being to form an issue.

II. It is a well known rule that, upon a demurrer at common law, the court does not proceed to inquire whether or not the last pleading (*i. e.*, the pleading which is popularly said to be demurred to) is good in law, and give judgment accordingly, but begins with the declaration, and examines the pleadings in their order, and, if any pleading is found to be bad, gives judgment against the party who pleaded it, without examining any further, but, if all the pleadings are found to be good, gives judgment in favor of the party who pleaded last; and it has been generally supposed that this rule was peculiar to the common law, yet in truth the same rule has always existed in the civil and canon law, though with this difference, namely, that, while at common law the court has to inquire only whether the successive pleadings are good in law, in the civil and canon law it has to inquire also whether they are proved. The principle is the same in both, and it is this: the plaintiff's action is founded wholly upon his first pleading, and therefore unless that is both true in fact and good in law, he must fail, and no question will arise upon any of the subsequent pleadings. It will not follow, however, that the plaintiff will be entitled to a judgment because he succeeds upon his first pleading, for that may be destroyed by the new facts alleged in the defendant's first pleading; and the latter must, therefore, be the next subject of inquiry. Moreover, as the plaintiff's first pleading must contain the whole strength of his case, so the defendant's first pleading must contain his entire defence; and, therefore, if that be

found to be untrue in fact, or not good in law, the plaintiff will be entitled to judgment, and no question will arise upon the subsequent pleadings. If, on the other hand, both questions are answered in the affirmative, it will then be necessary to decide the same two questions as to the plaintiff's second pleading, and so on to the end. Upon all the pleadings subsequent to the defendant's first pleading, the sole question will be whether the plaintiff can destroy the defendant's first pleading, and thereby sustain his own first pleading, or whether the defendant can sustain his own first pleading, and thereby destroy the plaintiff's first pleading.

C. C. Langdell.

[*To be continued.*]